BLANK PAGE

FILE COPY

Office - Supreme Court U.S.
FILED
AUG 20 1910
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

No. 349...

E. A. KELLEAM, NELL SOUTHARD, JOE E. KELLEAM and JOE R. SOUTHARD, JR., *Petitioners*,

vs.

MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, a corporation, MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, J. K. PERKINS, MRS. F. BATES, GLEN PERKINS, BESSIE MATHEWS, MRS. ELOUISE KULP, LEGGETTE HALL, LAMAR HALL, MARGUERITE BRADLEY KELLEAM, MARY KATE HALL, KELLEAM HALL, CLIFFORD KELLEAM, KATHLEEN KELLEAM, DR. FANNIN KELLEAM, FRANCIS KELLEAM, MRS. JIMMIE KELLEAM, and ROBERT KELLEAM,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

WARREN E. MILLER,
Washington, D. C.,
Attorney for Petitioners.

GLENN O. YOUNG,
Sapulpa, Oklahoma,
Of Counsel.

BLANK PAGE

INDEX.

Subject Index.

PETITION FOR WRIT OF CERTIORARI.

Summary Statement of the Matter Involved..... 2

Basis of the Court's Jurisdiction..... 5

Questions Presented..... 5

Reasons Relied Upon for Allowance of Writ..... 7

Prayer..... 7

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinion of the Court Below..... 8

Statement of the Case..... 8

Specifications of Error..... 10

Argument and Authorities..... 12

I. Jurisdiction of the County Courts of Oklahoma in probate matters is exclusive original jurisdiction..... 15

II. That jurisdiction was duly invoked and exercised prior to the institution of the instant proceeding as to both the subject matter and the parties..... 16

III. It was the duty of the federal court when suit was there filed to dismiss for want of jurisdiction..... 18

(A) Because the jurisdiction of the County Court had already been invoked..... 18

(B) Because the action was not local under 28 U.S.C.A., Secs. 116-118..... 21

(C) Because there was no diversity of citizenship between the real parties in interest as required by 28 U.S.C.A., 111-112..... 22

IV. The writ of certiorari should issue..... 27

Appendix I..... 29

Table of Cases.

Adair vs. Montgomery, 74 Okl. 21, 176 P. 911.... 16
Albert vs. Bascom, 245 F. 149..... 21
American Construction Co. vs. Jacksonville, etc., R. Co., 148 U. S. 372, 13 S. Ct. 758, 37 L. ed. 486.. 28
Anderson vs. Watt, 138 U. S. 694, 11 S. Ct. 449, 34 L. ed. 1078.....26, 27
Antene vs. Jensen, 47 Okl. 352, 148 P. 727..... 26
Asher vs. Bone, 100 F. (2d) 315..... 23

Bacher vs. Levy, 82 F. (2d) 270..... 23
Bank of Commerce & Trust of Richmond, Va., vs. McArthur, 248 F. 138..... 22
Barnett's Estate, In re, 52 Okl. 623, 153 P. 653.... 16
Barrett's Estate, In re, 181 Okl. 262, 72 P. (2d) 482..... 16
Berg vs. Merchant, 16 F. (2d) 990..... 23
Blake vs. Metz, 136 Okl. 150, 276 P. 765..... 26
Blythe vs. Hinckley, 173 U. S. 501, 19 S. Ct. 497, 43 L. ed. 783..... 21
Broderick's Will, 21 Wall. 503, 22 L. ed. 599..... 19
Bryan vs. Seiffert, 185 Okl. 496, 94 P. (2d) 526.... 15
Byers vs. McAuley, 149 U. S. 608, 13 S. Ct. 906, 37 L. ed. 867..... 19

Calkin vs. Wolcott, 182 Okl. 278, 77 P. (2d) 96.... 17
Clarke vs. Boysen, 39 F. (2d) 800..... 24

Desmare vs. U. S., 93 U. S. 605, 23 L. ed. 959..... 26
Dillard vs. Franklin, 57 P. (2d) 629, 177 Okl. 34.. 16
Dodds vs. Palmer Mountain Tunnel Co., 188 F. 447. 20
Dormitzer vs. Ill., etc., Bridge Co., 6 F. 217..... 21
Douglas' Estate, In re, 185 Okl. 25, 90 P. (2d) 35.. 16

Employers Reinsurance Corp. vs. Bryant, 299 U. S. 374, 57 S. Ct. 273, 81 L. ed. 289..... 24

Evans vs. Gorman, 115 F. 399 20
Ewing vs. St. Louis, 5 Wall. 413, 72 U. S. 808, 18 L. ed. 657 21

Farrell vs. O'Brien, 199 U. S. 89, 25 S. Ct. 727, 50 L. ed. 101 19
Findlay vs. Florida East Coast Ry. Co., 68 F. (2d) 540 21
First Nat. Bank of Rome, Ga., vs. First Nat. Bank of Jasper, Fla., 264 F. 83 24
First Nat. Bank of Rome, Ga., vs. Bank of Jasper, 264 F. 88 24
Fisher vs. Perkins, 122 U. S. 522, 7 S. Ct. 1227, 30 L. ed. 1192 19
Forsyth vs. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 S. Ct. 665 28
Freeney vs. First Nat. Bank of Plattsmouth, 16 F. 433 20

Gassin vs. McJunkin, 173 Okl. 210, 48 P. (2d) 320 ..... 17, 18
Garzot vs. Rios de Rubio, 209 U. S. 283, 28 S. Ct. 548, 52 L. ed. 794 19
Gentry's Estate, In re, 158 Okl. 196, 13 P. (2d) 156. 16
Goff vs. Goff, 124 Okl. 63, 253 P. 1014 17
Goodrich vs. Ferris, 214 U. S. 71, 29 S. Ct. 580, 53 L. ed. 914 17
Greer, Mills & Co. vs. Stroller, 77 F. 1 23

Hagan vs. Walker, 14 How. 29, 14 L. ed. 312 23
Hartford Accident & Indemnity Co. vs. Golberg, 178 Okl. 75, 61 P. (2d) 704 17
Hines vs. Armstrong, 182 Okl. 344, 77 P. (2d) 671 .. 16

Irwin vs. Mo. Valley Bridge Co., 19 F. (2d) 300, 275 U. S. 540, 48 S. Ct. 36, 72 L. ed. 415 23

Kieley vs. McGlynn, 21 Wall. 503, 22 L. ed. 599 19

Lau Ow Bew vs. U. S., 144 U. S. 47, 36 L. ed. 340, 12 S. Ct. 517 28

Mallow vs. Hinde, 6 L. ed. 599, 12 Wheat. 193 23
McNutt vs. General Motors Accept. Corp., 298 U. S. 178, 56 S. Ct. 780, 80 L. ed. 1135 24
Mitchell vs. Maurer, 293 U. S. 237, 55 S. Ct. 162, 79 L. ed. 338 23
Monk vs. Morgan, 48 Cal. App. 154, 192 P. 1042 17

Orton vs. Smith, 18 How. 263, 15 L. ed. 393 21

Parker vs. Lewis, 45 Okl. 807, 147 P. 310 16
Peck vs. Jenness, 7 How. 612, 12 L. ed. 841 20

Roberts vs. Lewis, 144 U. S. 653, 36 L. ed. 579, 12 S. Ct. 781 28
Roller vs. Murray, 234 U. S. 738, 34 S. Ct. 902, 58 L. ed. 1570 19

Security Trust Co. vs. Black River Nat. Bank, 187 U. S. 211, 23 S. Ct. 52, 47 L. ed. 147 18
Shainwald vs. Lewis, 5 F. 510 22
Simon vs. Hine, et al., 78 Okl. 224, 190 P. 264 23
Simon vs. Shaffer, 11 Fed. Supp. 450 23
Sims vs. Billings, 162 Okl. 51, 18 P. (2d) 1084 17
Sims' Estate, Appeal of, 162 Okl. 35, 18 P. (2d) 1077 18
Smith vs. Jennings, et al., 238 F. 48 ..... 19, 20
Southwestern Bell Telep. Co. vs. State, 75 Okl. 42, 181 P. 487 23
State ex rel. Morrell vs. Worten, 161 Okl. 130, 17 P. (2d) 424 15
Stratton vs. Stratton, 239 U. S. 55, 36 S. Ct. 26, 60 L. ed. 142 19
Sutter vs. Sockey, 97 Okl. 107, 223 P. 161 16

Sutton vs. English, 246 U. S. 199, 38 S. Ct. 254, 62 L. ed. 664..... 21
Sun Printing & Pub. Assn. vs. Edwards, 194 U. S. 377, 24 S. Ct. 696, 48 L. ed. 1027..... 26

Thompson's Estate, In re, 179 Okl. 240, 65 P. (2d) 442..... 15, 16

U. S. vs. Bean, 253 F. 1..... 23

Vidal vs. South American Securities Co., 276 F. 855..... 22

Waters-Pierce Oil Co. vs. Texas, 212 U. S. 86, 29 S. Ct. 220, 53 L. ed. 417..... 19
Wells vs. Helms, 105 F. (2d) 402..... 15, 17
Wheeler vs. Bigheart, 172 Okl. 262, 43 P. (2d) 1028. 17
Wilson vs. Beard, 26 F. (2d) 860..... 21
Wise vs. Cutchall, 171 Okl. 60, 41 P. (2d) 864..... 16
Wolfe vs. Graham, 185 Okl. 318, 90 P. (2d) 1067.. 17
Wright vs. Saltmarsh, 174 Okl. 226, 50 P. (2d) 694. 18

Zahn vs. Obert, 60 Okl. 118, 159 P. 298..... 26

Statutes.

Act Mar. 3, 1875 (18 Stat. L. 472)..... 24

U.S.C.A., Tit. 28, Secs. 111-112..... 11, 22
U.S.C.A., Tit. 28, Secs. 116-118..... 4, 6, 11, 12, 21
U.S.C.A., Tit. 28, Sec. 118..... 5, 10
U.S.C.A., Tit. 28, Sec. 344..... 19
U.S.C.A., Tit. 28, Sec. 347..... 28

Okl. Const., Art. VII, Secs. 13-16..... 15, 17

O. S. A., Tit. 58, Sec. 724..... 16
O. S. A., Tit. 58, Secs. 122-3..... 17
O. S. A., Tit. 12, Sec. 269..... 26

BLANK PAGE

SUPREME COURT OF THE UNITED STATES

No. .....

E. A. KELLEAM, NELL SOUTHARD, JOE E. KELLEAM and JOE R. SOUTHARD, JR., *Petitioners,*

vs.

MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, a corporation, MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, J. K. PERKINS, MRS. F. BATES, GLEN PERKINS, BESSIE MATHEWS, MRS. ELOUISE KULP, LEGGETTE HALL, LAMAR HALL, MARGUERITE BRADLEY KELLEAM, MARY KATE HALL, KELLEAM HALL, CLIFFORD KELLEAM, KATHLEEN KELLEAM, DR. FANNIN KELLEAM, FRANCIS KELLEAM, MRS. JIMMIE KELLEAM, and ROBERT KELLEAM,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners E. A. Kelleam, Nell Southard, Joe E. Kelleam, and Joe R. Southard, Jr., respectfully pray certiorari to review a decision of the United States Circuit Court of Appeals for the Tenth Circuit affirming a decree of the United States District Court for the Northern District of Oklahoma, which they assert was entered without jurisdiction or venue under the Constitution and Laws of the United States and contrary to the applicable pro-

visions of the local law and which involves the State and Federal Courts in a direct conflict, the one deciding the identical controversy one way, the other another. The opinion of the Circuit Court of Appeals, which does not appear in any published reports, appears in the record herewith presented at pages 149 to 159; the decree of the District Court appears at R. 88.

SUMMARY STATEMENT OF THE MATTER INVOLVED.*

Leggette D. Kelleam died intestate a resident of Creek County, Oklahoma, survived by E. A. Kelleam and Nell Southard, his brother and sister, by Fannie Bates and Mrs. Klyde Bates, paternal half-sisters, and by children of five deceased paternal half-brothers and sisters. Upon joint petition of the brother and sister, the brother was appointed administrator of the estate by the County Court of Creek County. He qualified by executing a statutory administrator's bond with the Maryland Casualty Company as surety, administered upon the estate, and presented his final account for approval. By an amended petition for determination of heirship and distribution he alleged that the estate was a maternal ancestral estate and that he and his sister were the sole heirs. After notice by publication, as required by the statutes of the State of Oklahoma, the County Court entered its decree adjudging the full brother and sister to be the heirs, ordering distribution of the estate to them, discharging the administrator and exonerating the bond. No appeal was prosecuted by any adverse claimant and the decree became final.

---

* For appropriate references to exhibits and pages of the printed Record supporting this statement, please see Appendix, p. 29.

Thereafter the half-blood nephews and nieces instituted in the County Court proceedings to vacate the decree of heirship and to recover an interest in the estate. Upon trial the County Court on September 15, 1937, sustained a demurrer to the amended petition and ordered the proceedings to vacate the decree dismissed. An appeal was prosecuted by the half-blood claimants to the District Court of Creek County.

Some months thereafter attorneys for the Maryland Casualty Company which had been a party to the proceedings in the County Court and attorneys for the defeated claimants conceived a plan to feign an issue in the federal court in an effort to circumvent the judgments of the County Court and the appellate tribunals of the state. Conformably the surety filed an equitable action in the United States District Court for the Northern District of Oklahoma against all the contending claimants asking that a receiver be appointed to take charge of the decedent's estate, the property impressed with an equitable lien to satisfy the claims of the half-blood kinsmen whom the surety averred were entitled to inherit and that its bond be exonerated.

Upon the date this suit was filed one of the half-blood contestants appeared in Tulsa in the Northern District and submitted to personal service. A few days afterward all remaining half-blood contestants voluntarily appeared by their attorneys and filed answer and cross-petition wherein they joined in the prayer of the surety company for a receiver, and asked that court to decree void the judgment of the County Court upon the same grounds which they had theretofore advanced in the County Court, and that they be decreed entitled to inherit.

Asserted ground of jurisdiction in the federal court was diversity of citizenship. Non-resident process was issued and served upon E. A. Kelleam and his son in the State of Arizona where they were domiciled; chancery subpoena was served upon the sister and her son at Blanchard, Okla., in the Eastern District, where they resided and had their citizenship. The nominal plaintiff, Maryland Casualty Company, is a resident and citizen of Maryland; the cross-petitioners who were named as defendants, but for whose benefit the suit was in fact instituted, were residents variously of Oklahoma, California, Arkansas and Texas, except one, Kelleam Hall, whose residence and citizenship was neither established by the evidence nor the court's findings. None of the parties resided in the Northern District of Oklahoma, and when the parties are aligned in accordance with their real interests there is no complete diversity of citizenship.

Pleas to venue and jurisdiction over the parties and the subject matter were presented to the trial court by the petitioners, overruled and exceptions saved. The court while treating the action as local under Sections 116-118, 28 U.S.C.A., attempted to readjudicate all matters theretofore determined by the County Court, held the judgment of that court that the property was ancestral void, that cross-petitioners were heirs and owners of a five-ninths interest, directed E. A. Kelleam and Nell Southard to account to cross-petitioners for five-ninths of the estate, the value of which was not determined, and decreed cross-petitioners to have a lien upon the property in the hands of a receiver to satisfy the judgment. The decree further determined the Maryland Casualty Company liable to the extent of $12,000 (but did not specify to whom), and decreed it entitled to exoneration by having the property in the hands of the receiver applied to the interest of the cross-petitioners.

BASIS OF THE COURT'S JURISDICTION.

Obviously any effort to enforce the decree of the United States District Court will involve the federal and state courts in direct conflict, and review by certiorari is sought upon this and other grounds.

Jurisdiction of the Supreme Court of the United States is invoked under Sec. 240 of the Judicial Code as amended by the Act of February 13, 1925 (Chap. 225, 43 Stat. 938, 28 U.S.C.A. 347) and under Para. 5 (b) of Rule 38.

The decree of the United States District Court was entered June 21, 1939; the final opinion of the United States Circuit Court of Appeals for the Tenth Circuit, upon appeal timely prosecuted, July 17, 1940, and on July 25, 1940, conformable to the rules, said Circuit Court by order stayed its mandate pending filing within thirty days of the instant proceedings.

QUESTIONS PRESENTED.

1. After final judgment has been entered by a County Court of the State of Oklahoma in the exercise of its probate jurisdiction to administer upon the estates of deceased persons which determined heirship, ordered and approved distribution, discharged its administrator and exonerated his statutory administrator's bond, may the non-resident surety upon such administrator's bond by entering suit in the United States District Court ostensibly for exoneration upon the bond against the principal, who is also a non-resident, invest jurisdiction in that court upon non-resident service under Section 118, 28 U.S.C.A., to decree void the judgment of the County Court exonerating the bond, and enter judg-

ment imposing personal liability upon the surety and the administrator?

2. After a County Court of the State of Oklahoma in the exercise of its jurisdiction to review its own decrees has rendered a judgment sustaining its decree of heirship from which an appeal has been taken conformable to the state law to the District Court of the state, may a non-resident surety upon the administrator's bond who was a party to the proceeding in the County Court, by instituting an original action in equity in the United States District Court upon service as in a local action under the provisions of Sections 116-118, 28 U.S.C.A., invest jurisdiction in that court to supersede the County Court and the appellate tribunals of the state to appoint a receiver of the decedent's estate, to review on questions of law and fact the correctness of the County Court's proceedings, void its judgment, determine heirship, direct an accounting by the administrator and persons determined lawful distributees by the County Court, impress a lien upon the decedent's estate (part of which is realty located in the district), and order the same foreclosed, upon the theory that the action is a *local* action, where there is no diversity of citizenship between the contending claimants and no party to the proceeding, either plaintiff or defendant, is a resident of the district in which the suit is instituted and questions of jurisdiction and venue are properly raised in the pleadings and preserved in the record?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

Petitioners herein show that the decree and opinion herein complained of involves the Federal and State Courts in Oklahoma in direct conflict of jurisdictions under circumstances that are novel and unusual and believed to be without exact precedent in the reported cases; that the Circuit Court has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision and has decided jurisdictional questions where jurisdiction is dependent upon diversity of citizenship and residence in the district in a manner in conflict with the applicable decisions of the Supreme Court of the United States and in conflict with decisions of other Circuit Courts of Appeal on the same matter, and has decided an important question of local law in a way that conflicts not only with local decisions governing the same matter but is directly contrary to a local decision upon the identical matter.

Wherefore, petitioners respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Tenth Circuit.

WARREN E. MILLER,
Washington, D. C.
Attorney for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Certiorari is sought to review an opinion of the United States Circuit Court of Appeals, not yet officially reported, which is set forth at R. 149 and wherein that court affirmed a decree of the United States District Court for the Northern District of Oklahoma entered without opinion upon findings of fact and conclusions of law, which appear at R. 77 to 92. The case is of general importance for the decree complained of is directly contrary to a prior adjudication of the identical controversy by a state court of competent jurisdiction, and its attempted enforcement will bring state and federal tribunals into direct conflict. Moreover, if the unusual procedure attempted is finally approved, a flood-gate is opened for a new and different type of litigation in the federal courts—suits in equity to "exonerate" sureties upon judicial bonds whereby all usual state court proceedings pending on appeal or after judgment can be brought into the federal courts for review, provided only the official surety is a non-resident. The jurisdiction of this court is invoked upon the grounds set forth in the petition, *supra*, p. 1.

STATEMENT OF THE CASE.

For brevity and to avoid duplication, a concise statement of the case, containing all that is material to consideration of the questions presented, has been incorporated in the petition for certiorari, *supra* (pp. 1-4). Appropriate page references to portions of the record and exhibits arranged in the order referred to and supporting the statement are appended as Appendix I. (See p. 29.)

From the foregoing it will be observed that this case presents a situation which is most extraordinary. A non-resident surety, which had been twice exonerated by the judgment of the court in which the bond was filed, instituted a suit in equity in the federal court against its principal for still a third "exoneration." The real purpose of the suit was not to exonerate the bond but to involve its principal in burdensome and expensive litigation for the benefit of third persons, whose rights had already been adjudicated in a court of competent exclusive original jurisdiction. To lend color to the complaint, the surety attempted to confess that its principal had perpetrated a fraud, not upon the surety, but upon third parties who themselves had been defeated in an effort to sustain those very charges of fraud in the County Court. These third parties, who could not themselves invoke the jurisdiction of the federal court because there was no diversity of citizenship, by cross-petition adopting the allegation and prayer of the surety, seek thereby to invest jurisdiction in the federal court to enter a decree countermanding the prior decrees of the state tribunal.

That there is no complete diversity of citizenship among the contending heirs is clear from the record. One full-blood claimant, Nell Southard, and her alleged grantee, Joe R. Southard, Jr., who was made a defendant, are residents of Blanchard, Oklahoma, of which state two of the defeated claimants (Francis Kelleam and Jimmie Kelleam) were also citizens. The only substantial controversy that could possibly exist between the non-resident surety and its principal, E. A. Kelleam, was a controversy grounded upon the bond and involving the validity of the judgments of the County Court. Neither the principal nor surety resided in the State of Oklahoma and no litigant, either plaintiff or defendant, resided in the Northern District of Oklahoma.

The case presents questions not only of an unusual nature but of unusual importance, for if a surety upon an administrator's bond in the Probate Court by instituting suit in the federal court for exoneration against the administrator may invoke the jurisdiction of the federal court to probate an estate, even to the extent of circumventing and nullifying valid judgments previously entered by the Probate Court and in effect countermanding its orders to its own officers by assessing penalties for compliance, and to supersede all appellate tribunals of the state, the authority of such state courts where it happens the surety is a non-resident for all practical purposes is at an end. The procedure adopted lends itself to every situation where the statutory liability of a non-resident surety upon a judicial bond may be involved.

SPECIFICATIONS OF ERROR.

Jurisdictional errors in the proceedings complained of are as follows:

I. After final judgment had been entered by a County Court of the State of Oklahoma in the exercise of its probate jurisdiction to administer upon the estates of deceased persons, which judgment decreed heirship, ordered and approved distribution, discharged its administrator and exonerated his statutory administrator's bond, it was error to permit the non-resident surety upon such administrator's bond to enter suit in the United States District Court ostensibly for another "exoneration" upon the bond against the principal, who was also a non-resident, and upon non-resident service under Section 118, 28 U.S.C.A., to decree void the judgment of the County Court exonerating the bond, and to enter judgment imposing liability upon the surety and the administrator.

II. If such an action may be maintained it is local under the provisions of Sections 116-118, 28 U.S.C.A., and not transitory nor governed by Sections 111-112, 28 U.S.C.A., and the contrary holding was error.

III. After a County Court of the State of Oklahoma in the exercise of its jurisdiction to review its own decrees has rendered judgment in a proceeding to vacate that court's final decree from which an appeal has been taken conformable to the state law to the District Court of the state, it was error to permit a non-resident surety upon the administrator's bond who was a party to the proceeding in the County Court to institute an original action in equity in the United States District Court and for that court to assume jurisdiction to supersede the County Court and the appellate tribunals of the state, and upon service as in a local action under the provisions of Sections 116-118, 28 U.S.C.A., to appoint a receiver of the decedent's estate, reinvestigate on questions of law and fact the correctness of the County Court's decree of heirship and distribution and its order discharging the bond, determine heirs, direct an accounting by the persons adjudged lawful distributees by the County Court, impress a lien in favor of the losing claimants in the County Court upon the decedent's estate (part of which is realty located in the district), and order the same foreclosed, upon the theory that the action was a *local* action, where there was no diversity of citizenship between the contending claimants and no party to the proceeding, either plaintiff or defendant, a resident of the district in which the suit was instituted and questions of jurisdiction and venue were properly raised in the pleadings and preserved in the record.

ARGUMENT AND AUTHORITIES.

Analysis of the opinion of the Circuit Court of Appeals indicates that jurisdiction in the United States District Court was sustained solely under Sections 116 and 118, 28 U.S.C.A., which sections provide that a local action involving property of a fixed character lying partly in one district and partly in another may be brought in the District Court of either district and that service of summons on absent defendants may be had in suits to enforce liens. That court held Sections 111-112, 28 U.S.C.A., upon which appellants relied, inapplicable.

The nature of the suit in the opinion of the Circuit Court is variously stated:

A: "*This is an action to impress a trust on real and personal property with a fixed situs in the Northern and Western Districts of Oklahoma.*" (R. 154. Italics added.)

B: "The estate has been closed, the property * * * distributed * * *, and *this is a proceeding not against the administrator but against those who procured the property.* The proceeding is against them *in their individual capacities*, and is an attempt *to deprive them of what it is alleged they procured through a void judgment* * * *." (R. 155. Italics added.)

C: "That a surety may maintain an action against its principal to obtain indemnity * * * is unquestioned. * * * in such an action a receiver may be appointed pending the determination of the issues in the action for exoneration. * * * But, say appellants, here the surety company has been twice exonerated. * * * *The whole controversy therefore centers around the question whether the judgment of the Probate Court was procured by fraud and is void.*" (R. 155-6. Italics added.)

The Circuit Court conceded and the trial court found no complete diversity of citizenship between the contending claimants. Insofar as the action was one to impress a trust upon real and personal property, there was no complete diversity of citizenship between those seeking this relief. The surety joined by the half-blood claimants some of whom were residents of Oklahoma were opposed by the administrator and distributees under the order of the County Court, some of whom were also residents of Oklahoma. Insofar as the proceeding was not against the administrator but against those who procured the property to deprive them of what they procured through a void judgment, there was no complete diversity of citizenship because resident claimants were aligned on opposite sides. With respect to the action of the surety to maintain indemnity against its principal and the appointment of a receiver pending determination of the issues, the Circuit Court concedes that *the whole controversy centers around the validity of the judgment of the Probate Court.* This necessarily follows, for if the judgment is valid, the surety is not entitled to indemnity or to a receiver. Obviously, in any proceeding to void the judgment all whose rights are affected by it must be made parties and when these are aligned in accordance with their true interests, the administrator and the surety and the distributees under the decrees of the County Court and their grantees must be arraigned against the half-blood claimants. When this is done, there is again no diversity of citizenship between the real parties in interest.

The decree and judgments of the court below erroneously sustain jurisdiction in the federal courts to hold an administrator liable as such for executing the orders of the court of which he was an officer. After the

County Court's jurisdiction to review its own decree had been properly invoked and after judgment was rendered by it sustaining the questioned decree, which judgment under the state law was final, subject only to be vacated or set aside on appeal, the United States District Court was without jurisdiction to intervene by appointment of receiver and take charge of the entire litigation at the instance of a surety who was the beneficiary of the County Court's judgment. That it did do so clearly constitutes an unauthorized exercise of judicial authority.

The opinion asserts that the County Court judgment was procured by fraud and was therefore void, but the acts charged as fraud (failure to give notice of the application for appointment as administrator and personal notice of the proposed distribution) are mere procedural acts like failure to issue some form of process. These acts are not required by the statutes of the state, and such omissions have been held not fraudulent nor necessary both by the prior decree of the County Court and by decisions of the Supreme Court of the State of Oklahoma in like cases.

Obviously a settlement which in no manner affected the rights of any party to this suit could not constitute fraud, but to reinforce charges of fraud, the opinion refers to conveyances after the judgment of the County Court sustaining its decree of heirship as acts of a "faithless trustee." Such conveyances were not by the administrator at all, but by distributees whose ownership of the property had been twice upheld by the County Court and in strict conformity with their rights under the judgment. Why such acts should be condemned with such severity is hard to understand.

Intervention by certiorari is imperative for otherwise the parties are confronted by directly conflicting judgments of state and federal tribunals. The state court, whose jurisdiction was first invoked and in which both the initial proceedings to adjudicate heirship and the second proceeding to determine the validity of the first adjudication, decided every issue which the federal court subsequently attempted to decide differently. Judgments of the state court in the circumstances are conclusive and the federal courts without jurisdiction.

I. Jurisdiction of the County Courts of Oklahoma in probate matters is exclusive original jurisdiction.

> "The County Court shall have the general jurisdiction of a Probate Court. It shall * * * grant letters testamentary and of administration, settle accounts of * * * administrators, * * * transact all business appertaining to the estates of deceased persons, * * * and distribution thereof. * * *." Const. Okla., Art. VII, Sec. 13.

Incident to probate jurisdiction, such County Courts may upon final settlement and distribution determine the heirs to whom the estate shall go. *In re Thompson's Estate,* 179 Okl. 240, 65 P. (2d) 442. Certiorari denied, *St. John* v. *Thompson,* 58 S. Ct. 38, 302 U. S. 718, 82 L. ed. 554; *Wells* v. *Helms* (C.C.A. 5th Cir., Okl.), 105 F. (2d) 402.

Where administration proceedings are pending in the County Court, or may be instituted therein, District Courts have no jurisdiction or power to undertake to administer upon such an estate. *Bryan* v. *Seiffert,* 185 Okl. 496, 94 P. (2d) 526. *State ex rel. Morrell* v. *Worten,* 161 Okl. 130, 17 P. (2d) 424.

The District Courts of Oklahoma have no power to appoint receivers for decedents' estates while administration proceedings are pending. *Dillard* v. *Franklin*, 57 P. (2d) 629, 177 Okl. 34.

The jurisdiction of the District Court in probate matters is appellate only. *In re Gentry's Estate*, 158 Okl. 196, 13 P. (2d) 156; *In re Douglas' Estate*, 185 Okl. 25, 90 P. (2d) 35; *In re Barrett's Estate*, 181 Okl. 262, 72 P. (2d) 482; *Wise* v. *Cutchall*, 171 Okl. 60, 41 P. (2d) 864; *Parker* v. *Lewis*, 45 Okl. 807, 147 P. 310.

The decree of the County Court determining heirship, rendered as incident to final settlement, unless appealed from, is conclusive. *In re Thompson's Estate*, 179 Okl. 240, 65 P. (2d) 442.

The appeal must be taken by a person interested, who was present, within ten days, and by a person interested, who was not a party, and not present, within thirty days. 58 O. S. A. 724; *In re Barnett's Estate*, 52 Okl. 623, 153 P. 653.

District Courts have no jurisdiction until and unless an appeal is prosecuted in compliance with this section. *Adair* v. *Montgomery*, 74 Okl. 21, 176 P. 911.

Provisions as to time must be observed. *Sutter* v. *Sockey*, 97 Okl. 107, 223 P. 161; *Hines* v. *Armstrong*, 182 Okl. 344, 77 P. (2d) 671.

II. That jurisdiction was duly invoked and exercised prior to the institution of the instant proceeding as to both the subject matter and the parties.

The surety, the administrator, and the contending heirs were all parties to the proceedings in the County Court. "Q. Mr. Green did appear in the County Court?"

"A. That is right, he was representing the Maryland Casualty Company." (R. 107.) See also R. 25, 43, 46, 123, 125, 96, 98, 101 and 102.

The statutes of the State of Oklahoma require no personal notice to persons claiming a right to inherit. Jurisdiction to distribute property, real and personal, depends upon notice by publication, which in effect is a summons to the world. *Monk* v. *Morgan,* 49 Cal. App. 154, 192 P. 1042; *Gassin* v. *McJunkin,* 48 P. (2d) 320, 173 Okl. 210; *Wells* v. *Helms,* 105 F. (2d) 402 (C.C.A. Okl. 2); *Goff* v. *Goff,* 124 Okl. 63, 253 P. 1014; *Wolfe* v. *Graham,* 185 Okl. 318, 90 P. (2d) 1067.

The service provided by statute has been upheld as constitutional. *Goodrich* v. *Ferris,* 214 U. S. 71, 29 S. Ct. 580, 53 L. ed. 914.

The decree of distribution is binding on both the administrator and his sureties. *Hartford Accident & Indemnity Co.* v. *Goldberg,* 61 P. (2d) 704, 178 Okl. 75. County Court judgments are entitled to the same presumptions of validity that attend those of other courts. Okla. Const., Art. VII, Secs. 13, 16; *Calkin* v. *Wolcott,* 77 P. (2d) 96, 182 Okl. 278.

The County Court also had the jurisdiction to review its own decree for fraud or irregularities which it exercised. *Wheeler* v. *Bigheart,* 172 Okl. 262, 43 P. (2d) 1028. The parties conceded this jurisdiction and first sued in the County Court. *The judgment of the County Court refusing to vacate the decree was in conformity to local law.*

The full-blood brother was entitled to Letters of Administration upon application forthwith and without notice. Sections 122-123, 58 O. S. A.; *Sims* v. *Billings,*

162 Okl. 51, 18 P. (2d) 1084; *Appeal of Sims' Estate,* 162 Okl. 35, 18 P. (2d) 1077, holding that:

> "A party under the statute having the prior right of appointment of administrator is entitled to the appointment without notice to anyone."

That the administrator failed to give personal notice to or assert that claimants he contended were not heirs were in fact heirs was not fraud. *Wright* v. *Saltmarsh,* 174 Okl. 226, 50 P. (2d) 694; *Gassin* v. *McJunkin,* 48 P. (2d) 320, 173 Okl. 210.

Laches and limitations were of course available as defenses in the County Court. The evidence before that court is not in the record, but it is established that at the trial in the federal court Ethel Riddler, one of the half-blood claimants, testified: "My sister heard that the estate had been administered and told me. That was two years ago last October." The date so fixed was prior to the decree of heirship and this evidence stands undisputed.

The construction of administration laws of the state by the Supreme Court of the state is binding on the federal courts. Such laws are not merely rules of practice, but laws limiting the rights of the parties. *Security Trust Co.* v. *Black River Nat. Bank,* 187 U. S. 211, 23 Sup. Ct. Rep. 52, 47 L. ed. 147.

III. It was the duty of the federal court when suit was there filed to dismiss for want of jurisdiction.

(A) Because the jurisdiction of the County Court had already been invoked.

When the surety entered suit in the federal court the prior jurisdiction of the County Court had attached

and been exercised. An appeal from the judgment sustaining the decree was pending in the appellate courts of the state.

The federal courts do not have general appellate jurisdiction to review judgments of the state courts, but limited jurisdiction as provided by 28 U.S.C.A., Sec. 344; *Waters-Pierce Oil Co.* v. *Texas* (Tex. 1909), 212 U. S. 86, 29 S. Ct. 220, 53 L. ed. 417; *Roller* v. *Murray,* 234 U. S. 738, 34 S. Ct. 902, 58 L. ed. 1570, and cases therein cited.

Authority to review under this section is limited to review of final judgments of the court of last resort of the state. *Stratton* v. *Stratton,* 239 U. S. 55, 36 S. Ct. 26, 60 L. ed. 142; *Fisher* v. *Perkins,* 122 U. S. 522, 7 S. Ct. 1227, 36 L. ed. 1192.

Even before the County Court's judgment became final, subject only to reversal or modification upon appeal, that court having first acquired jurisdiction was entitled to proceed.

Federal courts have no original probate jurisdiction *in rem* in administration of decedents' estates and cannot by entertaining jurisdiction of a suit against an administrator draw to themselves possession of the *res* or invest themselves with authority to determine claims against it. *Byers* v. *McAuley,* 149 U. S. 608, 13 S. Ct. 906, 37 L. ed. 867; *In re Broderick's Will,* 21 Wall. 503, 22 L. ed. 599; *Garzot* v. *Rios de Rubio,* 209 U. S. 283-302, 28 S. Ct. 548, 52 L. ed. 794; *Farrell* v. *O'Brien,* 199 U. S. 89, 25 S. Ct. 727, 50 L. ed. 101; *Smith* v. *Jennings, et al.* (C.C.A. 5th), 238 Fed. 48; *Kieley* v. *McGlynn,* 21 Wall. 503, 22 L. ed. 599.

Where the Probate Court orders an administrator to make a sale, the entire matter is within the jurisdiction of that court and the federal court may not enjoin the act, even though the judgments of the Probate Courts were fraudulently obtained and without jurisdiction and actions were pending to set aside the judgments of the Probate Courts. *Evans* v. *Gorman* (C.C.A. Ark. 1902), 115 F. 399. See, also, *Smith* v. *Jennings, et al.*, 238 Fed. 48.

Where a state court of competent jurisdiction has acquired jurisdiction over property long prior to the application for the appointment of a receiver in the federal court, any attempt on the part of the latter court to restrain or interfere with the enforcement of its judgment is said to be a palpable violation of this section, and also in violation of the rule of comity which universally obtains between courts of concurrent jurisdiction. *Dodds* v. *Palmer Mountain Tunnel Co.* (C.C. Wash. 1911), 188 F. 447.

As it is the settled law of Nebraska that the County or Probate Court has original and exclusive jurisdiction in the probate of a will, and the distribution of the estate therein, and that its judgment and order in such matter is final and conclusive unless appealed from, the federal court can take no step that would interfere with the administration and distribution of an estate in course of administration in such court. *Freeney* v. *First Nat. Bank of Plattsmouth* (C.C. Neb. 1882), 16 F. 433.

The Federal District Court has no supervisory power over the state courts either by injunction or otherwise. *Peck* v. *Jenness*, 7 How. 612, 12 L. ed. 841.

The Circuit Court should dismiss for an injunction, when the same title is in litigation in a state court of con-

current jurisdiction. *Orton* v. *Smith,* 18 How. 263, 15 L. ed. 393.

A party can ask no greater relief in equity in the courts of the United States than he could obtain were he to resort to the state courts. If in the latter courts equity would afford no relief, neither will it in the former. *Ewing* v. *St. Louis,* 5 Wall. 413, 72 U. S. 808, 18 L. ed. 657; *Blythe* v. *Hinckley* (Cal. 1899), 19 S. Ct. 497, 173 U. S. 501, 43 L. ed. 783; *Sutton* v. *English,* 246 U. S. 199, 38 S. Ct. 254, 62 L. ed. 664.

(B) Because the action was not local under 28 U.S.C.A., Secs. 116-118.

The surety had no lien upon the decedent's estate by contract or otherwise. It was not answerable for the personal acts of E. A. Kelleam as distributee or claimant. E. A. Kelleam as administrator was never served with process. (R. 52-53-95.) The surety did not seek to establish a lien or interest in any part of decedent's estate, but to have the distributees, Kelleam and Southard, account to the half-blood claimants. The terms of the decree show no relief *in rem* awarded the surety. Relief granted was *in personam*—that the distributees account to the half-blood claimants. (R. 88-92.)

Both the Second and Fifth Circuit Courts of Appeal have held such a suit to be local. *Wilson* v. *Beard* (C.C.A. 5th, N. Y.), 26 Fed. (2d) 860; *Findlay* v. *Florida East Coast Ry. Co.* (C.C.A. Fla. 1934), 68 F. (2d) 540, aff. (D.C. 1933) 3 F. Supp. 393, and cert. den. (1934) 54 S. Ct. 629, 292 U. S. 623, 78 L. ed. 1478.

The jurisdiction to enforce a lien given by this section means a lien existing anterior to the suit and not one caused by the institution of the suit itself. *Dormitzer*

v. *Ill., etc., Bridge Co.* (C.C.A. Mass. 1881), 6 F. 217; *Albert* v. *Bascom* (D.C. Tex. 1917), 245 F. 149.

A creditor cannot, where he was given no lien by contract, justify maintenance of suit in District Court other than in district of residence on ground that it was to enforce a lien upon specific personal property in the district. *Bank of Commerce & Trust of Richmond, Va.,* v. *McArthur* (D.C. Fla), 248 F. 138; *Vidal* v. *South American Securities Co.* (C.C.A. N. Y. 1922), 276 F. 855; *Shainwald* v. *Lewis* (D.C. Neb.), 5 F. 510, affirmed 2 S. Ct. 385, 108 U. S. 158, 27 L. ed. 691.

(C) Because there was no diversity of citizenship between the real parties in interest as required by 28 U.S.C.A., 111-112.

The court below in its decree assumed authority in what it treated as a local action upon non-resident service where there was no complete diversity of citizenship;

1. To vacate a decree of heirship.

2. To direct an accounting.

3. To determine personal liability of an administrator upon a judicial bond without any service upon the administrator.

4. To establish and foreclose a lien to satisfy an accounting not concluded.

5. To vacate conveyances without service upon the grantees.

6. To void a judgment of the County Court determining the same issue.

7. To appoint a receiver for a decedent's entire estate consisting of real and personal property where no proof is offered to show its situs within the state or district.

Questions of jurisdiction and venue were carefully preserved in the record. (R. 53-54-60-61-65-66-67-68-96-122-123.) To avoid possibility of waiver defendants stood on their pleas to jurisdiction at the trial. (R. 123.)

The relief sought and granted was general legal and equitable relief—in no manner limited to establishing and foreclosing a lien. There was no complete diversity of citizenship between the opposing litigants and no definite proof of either the citizenship or residence of one of them.

(1) *The parties should be aligned in accordance with their actual interests to test jurisdiction. Mitchell* v. *Maurer,* 293 U. S. 237, 55 S. Ct. 162, 79 L. ed. 338.

This case is in point also on the question of authority to appoint the receiver.

See, also, the following additional cases: *Berg* v. *Merchant,* 15 F. (2d) 990, holding that in a will contest heirs at law are indispensable parties and where no *complete* diversity of citizenship existed a demurrer was properly sustained, and *Asher* v. *Bone, et al.,* (C.C.A. 9th), 100 F. (2d) 315; *Irwin* v. *Mo. Valley Bridge and Iron Co.,* 19 F. (2d) 300, 48 S. Ct. 36, 275 U. S. 540, 72 L. ed. 415; *Backer* v. *Levy,* 82 F. (2d) 270; *U. S.* v. *Bean,* 253 F. 1; *Simon* v. *Hine, et al.,* 78 Okl. 224, 190 P. 264; *Simon* v. *Shaffer,* (D. C. Okl.), 11 Fed. Supp. 450; *Southwestern Bell Telep. Co.* v. *State,* 75 Okl. 42, 181 P. 487, citing 16 Cyc., p. 181; Stories' Eq. Pl., Sec. 271; *Hagan* v. *Walker,* 14 How. 29, 14 L. ed. 312; *Greer, Mills & Co.* v. *Stroller,* 77 F. 1; *Mallow* v. *Hinde,* 6 L. ed. 599; 12 Wheat. 193.

Presence of the defendant in a suit *in personam* is an essential element of the jurisdiction of a Federal Dis-

trict Court, and in the absence of this element the court is powerless to proceed to an adjudication. *Employers Re-insurance Corp.* v. *Bryant*, 299 U. S. 374, 57 S. Ct. 273, 81 L. ed. 289.

The Act of March 3, 1875 (18 Stat. at L. 472, chap. 137, sec. 5; Judicial Code, sec. 37, U.S.C.A. title 28, sec. 80), provides that if in any suit commenced in a Federal District Court it shall appear to the satisfaction of the court that such suit does not really and substantially involve a dispute or controversy properly within its jurisdiction, or that the parties to such suit have been improperly or collusively made or joined for the purpose of creating a cognizable case, the court shall proceed no further therein, but shall dismiss the suit. *McNutt* v. *General Motors Accept. Corp.*, 298 U. S. 178, 56 S. Ct. 780, 80 L. ed. 1135.

Constructive service can only bring non-residents within the jurisdiction of a court, where there is a *res* in the control of the court, and then only for the purpose of adjudicating his rights, if any, to the *res*. *First Nat. Bank of Rome, Ga.* v. *First Nat. Bank of Jasper, Fla.* (C.C.A. Fla. 1920), 264 F. 83, and *First Nat. Bank of Rome, Ga.* v. *Bank of Jasper* (C.C.A. 1920), 264 F. 88, certiorari granted, *First Nat. Bank of Jasper* v. *State Bank of Rome, Ga.* (1920), 41 S. Ct. 7, 254 U. S. 622, 65 L. ed. 443, and affirmed, *Bank of Jasper* v. *First Nat. Bank of Rome, Ga.* (1922), 42 S. Ct. 262, 258 U. S. 112, 66 L. ed. 490; *Clarke* v. *Boysen* (C.C.A. Wyo. 1930), 39 F. (2d) 860, cert. denied (1930), 51 S. Ct. 75, 282 U. S. 869, 75 L. ed. 769.

(2) *The burden of proof of the jurisdictional facts was upon plaintiff.*

The Circuit Court concedes the allegation of residence in the pleadings and evidence is not equivalent to an allegation of citizenship in the state, but asserts where the averment of residence was intended to mean and reasonably construed must be interpreted as meaning that the party is a citizen of a state, it is sufficient. But in analyzing the facts the court limits its review to the evidence regarding residence of the *surety* and the *petitioners* herein. The *citizenship of the half-blood claimants was equally material as the cases cited above clearly show.* The allegation as to citizenship of all except Kelleam Hall is that they "* * * *are residents and citizens of the State of Arkansas and the State of Oklahoma, the exact addresses of each this plaintiff does not know and cannot give* * * *." (R. 6.) The proof was that "all * * * *half-brothers and sisters live in either Oklahoma, Arkansas or California.*" (R. 119.) The allegation of the petition was traversed in the answer. (R. 62.)

The court's findings were generally that there was a diversity of citizenship between the Maryland Casualty Company and the defendants and cross-petitioners (R. 85) but specifically that the residences of the half-blood claimants were Milwaukee, Wisconsin, Yorbalinda, California, Santa Anna, California, Long Beach, California, Fort Smith, Arkansas, Galveston, Texas, Los Angeles, California, Alhambra, California, Waldron, Arkansas, Fayetteville, Arkansas, Blanchard, Oklahoma, Amarillo, Texas, Oklahoma City, Oklahoma. Robert Kelleam's residence was found merely to be "Texas" and there was no finding as to the residence of Kelleam Hall. These residences are in the main supplied by counsel who drew the journal entry. They were not established by any evidence.

In view of this confused state of the record, this case cannot be brought under the rule in *Sun Printing and Publishing Assn.* v. *Edwards*, 194 U. S. 377, 24 S. Ct. 696, 48 L. ed. 1027.

Under the Oklahoma law the answer put in issue the allegations of jurisdictional as well as non-jurisdictional facts. 12 O. S. A. 269 (R. L. 1910, sec. 4742). The answer does not waive such questions even where not traversed, but they may be raised at any stage of the proceedings. *Antene* v. *Jensen*, 47 Okl. 352, 148 Pac. 727; *Blake* v. *Metz*, 136 Okl. 150, 276 Pac. 765; *Zahn* v. *Obert*, 60 Okl. 118, 159 Pac. 298.

The cases of *Anderson* v. *Watt*, 138 U. S. 694, 11 S. Ct. 449, 34 L. ed. 1078, and *Desmare* v. *U. S.*, 93 U. S. 605, 23 L. ed. 959, do not support the Circuit Court's statement that proof of residence at a given place shifts the burden of proof as to citizenship. The point appears not to have been considered in either case. On the contrary in *Anderson* v. *Watt* the following language appears:

> "Under the Act of March 3, 1875, determining the jurisdiction of circuit courts of the United States (18 Stat. 472), the objection to the jurisdiction upon a denial of the averment of citizenship is not confined to a plea in abatement or a demurrer, but may be taken in the answer, and the time at which it may be raised is not restricted. Although the averment as to citizenship may be sufficient, yet, if it appear that that averment is untrue, it is the duty of the circuit court to dismiss the suit; and this court, on appeal or writ of error, must see to it that the jurisdiction of the circuit court has in no respect been imposed upon. *Morris* v. *Gilmer*, 129 U. S. 315, 325 (32: 690, 693); *Nashua & L. R. Corp.* v. *Boston & L. R.*

Corp., 136 U. S. 356, 374 (34: 363, 367); *Cameron* v. *Hodges*, 127 U. S. 322, 325 (32: 132, 133).

"Although the Fourteenth Amendment declares all citizens of the United States to be citizens 'of the State where they reside,' yet as the jurisdiction of the Circuit Court is limited in the sense that it has none except that conferred by the Constitution and laws of the United States, and the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears, it is essential that in cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctively and positively averred in the pleadings, or should appear affirmatively with equal distinctness in other parts of the record. It is not sufficient that jurisdiction may be inferred argumentatively from the averments. *Robertson* v. *Cease*, 97 U. S. 646, 649 24: 1057, 1058); *Brown* v. *Keene*, 33 U. S. 8 Pet. 112, 115 (8: 885, 886). It was therefore held in *Robertson* v. *Cease, supra; Continental Ins. Co.* v. *Rhoads*, 119 U. S. 237 (30: 380); *Menard* v. *Goggan*, 121 U. S. 253 (30: 914), and other cases, that the averment that the parties to a cause were 'residents' in different states, respectively, was not enough. * * *"

IV. The writ of certiorari should issue.

From the records in this case it is clear that the District Court is proceeding with the sanction of the Circuit Court in the exercise of an assumed jurisdiction not vested in it by law under circumstances which bring the federal and state courts into direct conflict. The cases heretofore cited show the Circuit Court's opinion is contrary to decisions of this court and of other circuits upon the same questions and to the very case of *Anderson* v. *Watt, supra,* which it purports to follow.

Because of the grave consequences that will result from an attempted enforcement of the federal court judgment, in view of the prior jurisdiction and adjudication of the state court, it is respectfully submitted that the writ of certiorari should issue under 28 U.S.C.A., para. 347 (Jud. Code 240), and the case of *Forsyth* v. *Hammond*, 166 U. S. 506, 41 L. ed. 1095, 17 S. Ct. 665, and *Roberts* v. *Lewis*, 144 U. S. 653, 36 L. ed. 579, 12 S. Ct. 781. In the latter case, as here, allegations of citizenship in the petition were put in issue by the answer; the record showed no proof of finding upon this essential point, upon which the jurisdiction of the Circuit Court depended. On appeal, conformable to the provisions of the then federal law, jurisdiction was assumed and the cause remanded with directions either to dismiss or set aside the verdict. The right to the writ is further supported by *Lau Ow Bew* v. *United States*, 144 U. S. 47, 36 L. ed. 340, 12 S. Ct. 517; *American Construction Co.* v. *Jacksonville, etc., R. Co.*, 148 U. S. 372, 13 S. Ct. 758, 37 L. ed. 486.

Respectfully submitted,

WARREN E. MILLER,
Attorney for Petitioners.

GLENN O. YOUNG,
Of Counsel.

August 14, 1940.

APPENDIX I.

	Record Page
Petition for Letters of Administration to the County Court of Creek County	22-96
Administrator's Bond	25-96
Amended Petition for Approval of Final Account, and for Decree Determining Heirship and Distribution of Estates	43-96
Notice by Publication	97-8
Decree of the County Court approving final account of administrator, determining heirs and providing for distribution of estate	46-96
Order of Final Discharge and Releasing Administrator and Bond from further liability	97-100
Petition to Vacate Decree filed in the County Court	123-4, 101
Amended Petition to Vacate Decree of the County Court, filed therein on Nov. 16, 1937	125-8, 97
Special Appearance of Maryland Casualty Co.	101
Demurrer pleading, *inter alia,* limitations and laches in the County Court	141-2
Judgment of the County Court sustaining demurrer and dismissing proceedings to vacate decree	102
Half-blood claimants' Record of Appeal to District Court	102
Bill of Complaint of Maryland Casualty Company, filed in United States District Court for the Northern District June 8, 1938	5
Recitation showing chancery subpoena served on Francis E. Kelleam same day	93

Answer and Cross-Petition of half-blood claimants 11

Chancery Subpoena to Nell Southard and J. R. Southard, Jr., and service (recitation regarding) 95

Order for service on E. A. Kelleam and Joe E. Kelleam, non-residents, and service (recitation regarding) 95

Recitation of service in the State of Arizona 95

Recitation regarding constructive service 95

Judicial findings on residence and citizenship (except Kelleam Hall) 78-79

Plea to the venue and jurisdiction 54-55

Order overruling same 60

Motion to Strike Cross-Petition for Want of Jurisdiction 61

Order overruling 67

Answers pleading want of venue and jurisdiction 61-66

Answer to Cross-Petition pleading jurisdiction and venue 68

Objection to Jurisdiction and Venue at the trial and Order Overruling 96-122

Decree of the United States District Court 88-92

BLANK PAGE